Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-24

WILLIAM RUSSELL GREENFIELD, JR., M. D.,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

William Russell Greenfield, Jr., M.D., the Petitioner herein, prays that a Writ of Certiorari issue to review

the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-styled case on June 5, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is printed in Appendix A hereto, infra, page 16. The judgment of the United States Court of Appeals for the Fifth Circuit is printed in Appendix A hereto, infra, page 23.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit (Appendix A, infra, page 23) was entered on June 5, 1978. The jurisdiction of the Supreme Court is invoked under Rule 19(1)(b), Revised Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

I

Whether the destruction by government agents of four of the nine taped conversations between the government agent and the Defendant violated the Defendant's Constitutional rights under the rule of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

II

Whether the admission of the five tapes, in which approximately half of the material was admittedly either

unintelligible, inaudible, or contained gaps, was so prejudicial to the Defendant as to violate his constitutional right to a fair trial.

III.

Whether the basic constitutional standards for the admission of electronically gathered evidence were met especially when the Court had been advised that the basic integrity of the tapes and of the government agent who made the tapes was in question and where four tapes had been destroyed without any record and where the tapes had no clearly defined beginning and ending, and where there was no agreement by the Court and the lawyers on much of what was being said on the tapes.

IV.

Whether, in the factual context of this case, considering the conviction of the Defendant-Appellant on the *one single count* on which the Court mistakenly explained the evidence to the Jury, over the objection of the Defendant, the Court's actions were so prejudicial as to require reversal.

V.

Whether the Defendant's Constitutional rights under the Fifth Amendment of the Constitution of the United States were violated by the admission of evidence concerning courts on which the Defendant had been previously acquitted.

VI

Whether the evidence from the government's own witnesses established entrapment as a matter of law.

CONSTITUTIONAL PROVISIONS AND STATUES INVOLVED

I.

Constitution of the United States, Amendment V

"no person shall...be subject for the same offense to be twice put in jeopardy of life or limb...nor be deprived of life, liberty, or property, without due process of law....."

II.

Title 21, Section 841(a)(1), *United States Code*

"...it shall be unlawful for any person knowingly or intentionally...to...distribute, or dispense... [without a legitimate medical purpose]...."

STATEMENT OF THE CASE

William Russell Greenfield, Jr., M.D., was orginally indicted in the Middle District of Alabama on April 8, 1976. The ten count indictment charged in each count a violation of Title 21, §841 (a)(1), *United States Code*.

Dr. Greenfield was orginally tried on May 17, 1976, before the Honorable Frank M. Johnson, Jr., in a jury trial which lasted two days. At the conclusion of the trial, the

Jury returned a verdict of guilty on three counts of the indictment, counts VII, VIII, and IX.

On the 19th day of May, 1976, the Court entered an Order adjudging the Defendant Greenfield guilty and sentenced Dr. Greenfield to the custody of the Attorney General for a period of two years with a two year special parole term.

Dr. Greenfield appealed his conviction to the Fifth Circuit on Appeals and his conviction was reversed by that Court on August 3, 1977.

Prior to his second trial, Dr. Greenfield strenuously objected to the evidentiary use by the United States of five tapes obtained by use of electronic surveillance on the basis that four other tapes had been attempted and destroyed by the government agents and five tapes which were available were unintelligible, contained gaps, contained speakers which were incorrectly identified by the government, had no determinable beginning and ending, no verification that they were made on a particular date, time or location, and that they were not complete. An *in camera* hearing on the five tapes was held on September 5, 1977. The Judge allowed the five tapes and government prepared transcripts to go into evidence over Dr. Greenfield's objections.

The Trial Court allowed *over* objection detailed "proof" of prescriptions upon which Dr. Greenfield had previously been acquitted in violation of Rule 403 Federal Rules of Evidence.

The Trial Court refused to direct a verdict at the close

of the government's case and refused to find entrapment as a matter of law.

After the Jury had begun deliberations, they returned, asked questions, and received correct responses from the Judge. The Jury returned to its deliberations. The Trial Judge *ex mero moto,* over objection, called the Jury back, *incorrectly* told them what some evidence had been, excused them and after Dr. Greenfield pointed out his error called the Jury back again to "correct" what he had said. This exchange was on crucial evidence concerning whether Dr. Greenfield was in his office on certain occasions when prescriptions were obtained.

The Court of Appeals for the Fifth Circuit was presented with the above questions and although the Court wrote to each issue the Trial Court was affirmed on June 5, 1978.

REASONS FOR GRANTING WRIT

I, II, III

The decision of the Court of Appeals for the Fifth Circuit concerning standards to be met for admission of tape recordings and transcripts is not consistent with the decisions of the United States Courts of Appeal for the Second and Eighth Circuits. While there may be no "formulistic" standards governing admissibility of tape recordings and transcripts there must be a baseline. When the government admits attempting four tapes which were destroyed and produces five times which are unintelligible, contain gaps, and have no discernible beginning and ending the baseline standard has not been met. The Trial

Judge should have discretion, but it isn't unfettered. When fifty percent or more of the recorded material is unintelligible, the trustworthiness of the recordings as a whole must be questioned. The recordings in this case simply did not meet the minimum standards of the *United States v. Philip Onori* (5 Cir. 1976), 535 F.2d 938 and certainly not those of *United States v. McMillan* (8 Circ. 1974), 508 F.2d 101, 104, cert. den, 421 U.S. 916, 95 S.Ct. 1577, 43 L.Ed2d 782 (1975) or *United States v. McKeever* (S.D. NY 1958), 169 F.Supp. 426, rev'd on other grounds (2 Cir. 1959), 271 F.2d 669.

The requirements of *Brady v. Maryland,* 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963) should at least preclude the use by the government of the five tapes when four have admittedly been destroyed. The opportunity to evaluate the evidence for exculpatory material was totally lost when the agent destroyed these tapes. The Fifth Circuit ignored the defense argument on the missing tapes.

IV.

The Fifth Circuit in considering the issue of the prejudice to the Defendant by the Trial Judge's comments incorrectly summarizes what happened. The Jury returned and asked a question on an evidentiary matter of the Court which the Court answered. The Jury went back to its deliberations. The Court, then *ex mero moto,* over the objection of Dr. Greenfield, called the Jury back and incorrectly explained a critical piece of evidence. After the Jury again retired the defense called this error to the Court's attention and the Court had to call the Jury back and explain that he had made a mistake. This series of events involved crucial evidence concerning whether or not Dr. Greenfield was in his office when the prescription (upon which he was ultimately convicted) was given to the undercover agent. The Court incorrectly told the Jury that Dr. Greenfield was not in his office on two occasions. This was not the evidence and although the Court later corrected this misstatement it simply was the kind of error that cannot be glossed over by making reference to the correctness of the Court's earlier charge. While we do not contend that the Court was deliberately partisan, we do insist that the Jury's function in evaluating the evidence was encroached upon. Further, considering the Defendant's conviction on the one count where the Court had incorrectly stated the Petitioner was not in the office, it cannot be said that the Judge's comments were not unfair and prejudicial to the Defendant. The Petitioner recognizes that a court may analyze and dissect evidence but the court may not either distort or add to the evidence. The Trial Judge's comments in this case did not meet the standards of *Quercia v. United States* (1933), 289 U.S. 466, 53 S.Ct. 698, 77 L.Ed. 1321. Further, when a trial judge tries to help a jury with its difficulties he should clear the difficulties away with "concrete accuracy." *Bollenbach v. United States* (1946), 326 U.S. 607, at p. 613. The Trial Judge did not do that here. He misstated the evidence to the substantial detriment of the Petitioner.

V.

In Petitioner's first trial he was acquitted on six counts of the indictment. On his retrial the Court, over the objection of Defendant, and contrary to Rule 403 of the *Federal Rules of Evidence,* allowed into evidence copies

of prescriptions which were written by Dr. Greenfield. The Petitioner recognizes that the Court in its discretion could allow the government to show the visits by the undercover agents to Dr. Greenfield's office on these six occasions and could show that she obtained prescriptions. The Petitioner insists that to allow the government to "prove" charges on which he had been acquitted was extremely prejudicial.

To allow the government to essentially "try the De fendant again" on these charges put the Defendant in jeopardy twice in violation of the Fifth Amendment of the Constitution of the United States.

The Trial Court abused its discretion in this regard and the Fifth Circuit sustained the Trial Court on the theory that the evidence admitted was clearly material. The Trial Court abused its discretion in admitting the evidence under *Federal Rules of Evidence* 403 and 404(b). This evidence, including the copies of the prescriptions, was highly prejudicial and should not have been admitted because the probative value was far outweighed by the prejudicial impact on the Defendant.

VI.

The evidence established entrapment as a matter of law. The Trial Court refused to so find and the Fifth Circuit sustained the Trial Judge. The undisputed evidence was that Dr. Greenfield was treating the undercover agent on each and every occassion when she obtained prescriptions. Five local physicians said what Petitioner did, under the fact circumstances, was for a legitimate medical purpose. The evidence clearly reflected that his

prescriptions for the undercover agent were at her constant urging, cajoling, importuning and were given her as a result of her creative lies concerning her need for the Ionamin.

The record contains no evidence of predisposition on Dr. Greenfield's part to write illegal prescriptions. The government agents created a bogus story. Dr. Greenfield gave the agent a physical check-up and made a medical record. He, rather than being disposed to "push dope," suggested coffee rather than pills to the undercover agent. The record is replete with the evidence of the cajoling, lying and creative activity on the part of the government.

If Greenfield committed a crime he was entrapped. *United States v. Carroll* (6 Cir. 1975), 518 F.2d 187. No criminal design originated with Dr. Greenfield. *United States v. Russell* (1973), 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366. The requirements of the *United States v. Russell, supra,* on this record require the finding, if Dr. Greenfield committed a crime, he was entrapped.

CONCLUSION

William Russell Greenfield submits that the Writ of Certiorari should be granted and upon final determination of this cause the conviction of the Petitioner in the United States District Court for the Middle District of Alabama should be reversed in that:

(a) That there are material and substantial conflicts and differences in the standards required in the Second and Eighth Circuits for the admission of tape recordings

and transcripts and the standards required in the Fifth Circuit;

(b) That these difficulties and conflicts are due to be resolved by the Supreme Court in a manner establishing a baseline requirement for the admission of such evidence;

(c) That the Court of Appeals for the Fifth Circuit failed to observe the requirements of *Brady v. Maryland, supra* in evaluating the Petitioner's claim concerning the tapes which the government had destroyed;

(d) That the admission of certain evidence, and the factual context in which it was admitted, violated the double jeopardy provisions of the Fifth Amendment to the Constitution of the United States;

(e) That the evidence of record demonstrates that the Defendant was entrapped, if he committed a crime at all, utilizing the standards and teachings of *United States v. Russell, supra.*

For the reasons outlined, Petitioner respectfully requests this Court to grant his Petition for Writ of Certiorari in order that the issues may be fully briefed and decision in favor of Petitioner ultimately reached.

RESPECTFULLY SUBMITTED,

James Jerry Wood

James Jerry Wood
Attorney for Petitioner

ADDRESS:

P. O. Box 4189
Montgomery, Alabama 36101

DATED: July 5, 1978.

CERTIFICATE OF SERVICE

I, James Jerry Wood, a member of the Bar of the Supreme Court of the United States and counsel of record for William Russell Greenfield, Jr., M.D., Petitioner herein, hereby certify that on July 5, 1978, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Petition for Writ of Certiorari on each of the parties herein, as follows:

On the Solicitor General, Department of Justice, Washington, D. C. 20530, by depositing such copies in the United States Post Office, Montgomery, Alabama, first class postage prepaid, properly addressed to the post office address of the Solicitor General, Washington, D.C. 20530.

On the Honorable Barry Teague, United States Attorney for the Middle District of Alabama, Federal Building, Montgomery, Alabama 36104, by depositing such copies in the United States Post Office, Montgomery, Alabama, first class postage prepaid, properly addressed to the post office address of the United States Attorney, the above-

named counsel of record, at the Federal Building, Montgomery, Alabama 36104.

All parties required to be served have been served.

DATED 5th day of July, 1978.

James Jerry Wood

James Jerry Wood
P. O.Box 4189
Montgomery, Alabama 36104

APPENDIX A

OPINION

UNITED STATES of America,
Plaintiff-Appelle,

v.

William Russell GREENFIELD, M. D.,
Defendant-Appellant.

No. 77-5617.

United States Court of Appeals,
Fifth Circuit.

June 5, 1978

On remand, 554 F.2d 179, defendant was convicted before the United States District Court for the Middle District of Alabama, Virgil Pittman, Chief Judge, of knowingly distributing a controlled substance without a legitimate medical purpose, and he appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) although trial judge inaccurately amended answer to jury's factual question, defendant was not denied a fair trial where only a short time elapsed from misstatement to correction and comments did not betray partisanship, add to the evidence or encroach on jury's functions; (2) tape recordings are not per se inadmissible because they are partially inaudible; (3) it was not error to permit the Government to introduce evidence of contacts between defendant and government agent prior to earliest date named in the indictment, during which defendant also prescribed drugs for the agent, and (4) in view of

evidence concerning quantity of drugs, defendant's inquiries and his having prescribed drugs for agent in others' name, issue of entrapment was for jury.

Affirmed.

1. Criminal Law ⇐859

Although in amended answer to factual question of the jury the trial judge gave an incorrect summary of part of the evidence, defendant was not deprived of a fair trial where only a short time elapsed from misstatement to correction and when read in context and taking into account the court's accurate charge, such comments did not betray partisanship, add to the evidence or encroach on the jury's function.

2. Criminal Law ⇐438.1

There are no formulistic standards governing admissibility of tape recordings and transcripts thereof.

3. Criminal Law ⇐438.1

Tape recordings are not per se inadmissible because they are partially inaudible; issue is whether the unintelligible portions are so substantial as to render the recording as a whole untrustworthy and such determination is left to the sound discretion of the trial judge.

4. Criminal Law ⇐444

In case of tape recordings and transcripts thereof recommended procedure is to hold the prior hearing concerning intelligibility of the tapes and accuracy of the proposed transcripts, with opposing counsel entitled to an opportunity to contest the transcripts.

5. Criminal Law ⇐438.1

Although tape recordings were allegedly inaudible, it was not abuse of discretion to permit the jury to hear the tapes or read the transcripts thereof where trial judge held a prior hearing concerning intelligibility of the tapes and accuracy of the transcripts, tapes were available to defendant from time of prior trial and Government laid a proper foundation for their admission.

6. Criminal Law ⇐369.2(7)

It was not error to permit the Government to introduce evidence of contacts between defendant and government agent prior to earliest date named in the indictment, during which defendant also prescribed drugs for the agent, since such evidence was material to issue whether his continuing prescriptions for the same patient, some written in the names of other persons, were for legitimate medical purposes, evidence was not inflammatory, judge issued a proper limiting instruction and verdict belied notion that jury may have been swayed into convicting defendant for being a bad individual. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 101 et seq., 401, 401(a)(1), 21 U.S.C.A. §§ 801 et seq., 841, 841(a)(1); Federal Rules of Evidence, rules 403, 404(b), 28 U.S.C.A.

7. Criminal Law ⇐739.1(2)

Defense of entrapment was for jury, in prosecution for knowingly distributing a controlled substance without a legitimate medical purpose, in view of evidence concerning quantity of drugs prescribed, nature of defendant's inquiries and his having prescribed drugs for government agent in others' name. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 101 et seq., 401(a)(1),

21 U.S.C.A. §§ 801 et seq., 841(a)(1).

8. **Drugs and Narcotics** ⇐123

Conviction of knowingly distributing a controlled substance without a legitimate medical purpose was supported by the evidence, including evidence that defendant gave government agent a prescription for Ionamin without seeing her. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 101 et seq., 401(a)(1), 21 U.S.C.A. §§ 801 et seq., 841(a)(1).

Appeal from the United States District Court for the Middle District of Alabama.

Before WISDOM, THORNBERRY, and RUBIN, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Following the reversal of his first conviction on three of ten counts of knowingly distributing a controlled substance without a legitimate medical purpose, in violation of 21 U.S.C § 841(a)(1), *United States v. Greenfield,* 5 Cir., 554 F.2d 179, the defendant was retried on those three counts, and convicted on one. He again appeals. Having considered carefully each of the errors contended to have been committed at the new trial, we find that the defendant was fairly tried and affirm the conviction. *See Greenfield, supra,* 554, F.2d at 180—181.

[1] After the jury had begun its deliberations, it put a factual question to the judge. The judge gave a correct answer that he later amended inaccurately, giving the jury an incorrect summary of part of the evidence. However, immediately after the jury left the courtroom, counsel objected, the judge learned that he had been incorrect, and recalled the jury. He then gave what both sides agree

to be an entirely correct statement of evidence. The jury thereafter deliberated for some time, and returned a verdict of "not guilty" on two counts, guilty on the third.

Read in context and taking into account also the court's accurate charge, to which no objection is made, the court's comments do not betray partisanship, add to the evidence, or encroach on the jury's functions. *Compare U. S. v. Cisneros,* 5 Cir. 1974, 491 F.2d 1068. They were finally made entirely accurate, only a short time elapsed from misstatement to correction, and they were not unfair to the defendant.

[2-5] It is also argued that the court erred in permitting the jury to hear and to read transcripts of conversations between the government's agent and Dr. Greenfield, recorded through a transmitter in the agent's shoulder bag and broadcast to a receiver in a van parked nearby. The government attempted to tape conversations on nine occasions, but could produce audible tapes on only five; the remaining four tapes were destroyed, and no records concerning them were kept. The defense argues that the extant tapes are largely inaudible, confusing, and substantially untrustworthy.

This court has not adopted any formulistic standard to guide the admissibility of tapes and transcripts. Tapes are not per se inadmissible because they are partially inaudible; the issue is whether the unintelligible portions "are so substantial as to render the recording as a whole untrustworthy. This determinations is left to the sound discretion of the trial judge.". *U. S. v. Avila,* 5 Cir. 1971, 443 F.2d 792, 795, cert. denied, 1971, 404 U.S. 944, 92 S.Ct. 295, 30 L.Ed.2d 258.

The tapes were available to the defendant from the time of the first trial. The trial judge followed the course we have recommended in holding a prior hearing concerning the intelligibility of the tapes and the accuracy of the proposed transcripts, and in permitting defense counsel to contest the transcript as proposed by the government, *United States v. Onori,* 5 Circ. 1976, 535 F.2d 938, 947–949. Further, the government laid a proper foundation for the admission of the tapes, as required by *U. S. v. Biggins,* 5 Cir. 1977, 551 F.2d 64, 66. The court did not abuse its discretion in permitting the jury to hear the tapes or to read the transcripts in question.

[6] The court did not err in permitting the government to introduce evidence of contacts between Dr. Greenfield and the government's agent prior to the earliest date named in the indictment, during which Greenfield also prescribed drugs for the agent. While Dr. Greenfield had been earlier acquitted of six counts of violating 21 U.S.C. § 841 that were predicated on those earlier contacts the evidence admitted was clearly material to the question whether his continuing prescriptions for the same patient (some written in the names of other people) were for a legitimate medical purpose. The evidence was not inflammatory, the judge issued a proper limiting instruction, and the jury's evidently considered verdict belies the notion that it may have been swayed into convicting the defendant for being a bad individual. Consequently, it cannot be said that judge abused his discretion in admitting evidence under the Federal Rules of Evidence, Rules 403 and 404(b).

[7] The judge correctly charged the jury on entrapment; the evidence was not sufficient to require a directed verdict. There was evidence concerning the quantity of drugs prescribed, the nature of the doctor's inquiries, and of his having prescribed drugs for this patient in a name other than the patient's; these warranted the conclusing that no legitimate medical purpose underlay his prescriptions, and that his purpose in prescribing drugs without a legitimate purpose was not "implanted" by the government's informer. *U. S. v. Russell,* 1973, 411 U.S. 423, 435–436, 93 S.Ct. 1637, 1644–1645, 36 L.Ed.2d 366.

[8] The defense finally contends that, even viewing the evidence most favorably for the government, insufficient evidence exists to support the jury's verdict under *Glasser v. United States,* 1942, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680. There was adequate evidence to support the jury verdict as to February 11, when Greenfield gave the government agent a prescription for Ionamin without seeing her.

For these reasons, the conviction is AFFIRMED.

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 77-5617

D. C. Docket No. CR-76-14-S

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIAM RUSSELL GREENFIELD, M.D.,
Defandant-Appellant.

Appeal from the United States District Court for the
Middle District of Alabama

Before WISDOM, THORNBERRY, and RUBIN,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

June 5, 1978

Issued As Mandate:

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 77-5617

UNITED STATES OF AMERICA,
Plaintiff-Appelle.

versus

WILLIAM RUSSELL GREENFIELD, M.D.,

Defendant-Appellant.

Appeal from the United States District Court for the
Middle District of Alabama

ORDER:

( ) The motion of _____
for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

(✓) The motion of _____ Appellant _____
for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including July 5, 1978 the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period

above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion for a further stay of the issuance of the mandate is GRANTED to and including _____ _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion for a further stay of the issuance of the mandate is DENIED.

S/Circuit Judge

UNITED STATES CIRCUIT JUDGE